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THE USE OF THE WORD "SURVIVOR" IN WILLS.

The will of a deceased testator which recently came under the writer's notice contains the following clause; and as it raises a question of general interest to laymen and the profession and presents an instance in which the real purpose of the testator was inadvertently frustrated by the careless use of a single technical word, a discussion of it may be interesting:

> "I give and bequeath all the rest of my estate of every kind and description, both real and personal, to my mother A. and my sister B., share and share alike, and in the event of the death of either, the survivor to inherent the entire amount."

At the death of the testator the two beneficiaries were surviving. What estate do the devisees take?

The question presented in this residuary clause of the instrument is the period of time to which the survivorship refers; that is to say, whether the beneficiaries named take a life estate as tenants in common at the time of the death of the testator, with remainder over to the survivor; or whether each is vested with an estate in fee for a moiety upon the happening of that event. Or, to state it in other words, whether the period of survivorship relates to a time anterior or posterior to the death of the testator.

This question has been frequently passed upon by the courts of English and American jurisdictions. It involves a consideration primarily, if not entirely, of the vexed and technical question of survivorship, concerning which the decisions of neither the English nor the American courts have been uniform. In a note to § 565 of his treatise on the Law of Wills, Prof. Schouler says:

> "Mr. Jarman, after a patient and laborious examination of the English precedents which have thus turned the course, concludes his chapter, like its commencement, with a caution. 'This word "survivor,"' said Wood, V. C, 'is certainly one that ought to be avoided by any person who is not a con-

summate master of the art of conveyancing, for I suppose no word has occasioned more difficulty.'" 33 L. J. Ch. 532, quoted in 2 Jarman on Wills, 751.

In considering the doctrine as it grows out of the clause in reference, two things are to be kept in mind; first, that the period at which the surviving beneficiary is to take the entire estate is not clearly specified; and second, that no intervening estate is injected. In arraying the authorities, that class of cases which interposes an estate to a devisee before the survivors become vested in possession with the remainder—usually a life tenancy to a widow with remainder over to children A and B or the survivors of them—will be cited, for the reason that light will be thrown upon the precise case by the expression of the judges. The examination of the authorities, as found in the adjudicated cases, has been general in its scope and not controlled by the decisions in any particular jurisdiction. Wherever a case was found which seemed to be in point, it is cited, whether adverse to or in consonance with the conclusion presently to be expressed, and such comments noted as appear proper to explain or differentiate it from the principal case.

TEXT WRITERS.

The rule of construction of such clauses, as it formerly prevailed in England, was first laid down by Lord Chancellor Cowper in the case of Lord Bendin *v.* The Earl of Suffolk, 1 Peere Will. 99, and was followed in many cases. It was that where a bequest was made to two or more persons, vesting immediately, as tenants in common, with a limitation over to survivors, unless a contrary intent should appear from other parts of the will, those who survived the testator took absolutely at the testator's death. The reason of the rule, as given in Allen *v.* Farthing (quoted in 2 Jarman on Wills 688, 689) by the vice Chancellor Sir John Leach, is "that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally not being a contingent event." But the same judge held in the leading case of Cripps *v.* Wolcott, 4 Madd. Ch. R., 11, that if there be any time subsequent to the death of the testator to which the period of survivorship may be referred, as for example, the

death of a life tenant, that period will be adopted, unless a special intent to the contrary be expressed in the will. 3 Jones Equity 221. Schouler on Wills, § 565, states the prevailing rule in England as follows:

> "As to gifts made to persons who shall be surviving at some period not clearly specified in the will, the inclination of the courts was, formerly, to refer the survivorship *prima facie* to the period of the testator's own death. Such is the prevailing preference in construction where real estate is devised; and it holds in the United States irrespective of the kind of property given; but late English precedents refer words of survivorship *prima facie* to the period of payment and distribution instead, where personal estate is bequeathed to certain persons by name, or to a class of persons as tenants in common, and the survivors of them. Into the long-drawn controversy over this change of construction we shrink from entering. Words of survivorship, may, agreeably to the true intent of the will in its full scope, refer to the death of some party subsequent to the testator's own death. But yet, after all, the better opinion must be that the question to what period survivorship is to relate depends rather upon the apparent intention of the testator in each case, than upon any rigid rule, or any technical words."

And in a note to the section the author states upon the cited authority of Crane *v.* Cowell, 2 Curt. 751, that:

> "Limitations upon which a devise is to take effect by survivorship rarely refer to death while the testator is alive; but the persons who are to take as survivors are meant to survive a death which happens at or after the testator's own decease."

In the 6th Edition of the recent English treatise on the Law of Wills by H. C. Theobald, K. C. (1905), the author recites the general rule prevailing in that country which refers the period of survivorship to the time of distribution when there is an intermediate estate; but distinguishes between such cases and those in which the gift is immediate. He quotes at p. 654 the following excerpt from Cripps *v.* Wolcott, 4 Mad. 11, which seems to be the leading case on both points:

> "Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the

> period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if a previous life estate be given, then, the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy."

And upon the authority of In re Gregson, 2 D. J., 1 S., 428, and in re Belfast Town Council; ex parte Sayers, 13 L. R., Jr., 169, the author says the rule is applicable alike to personalty and realty. "Therefore," says he (page 654) "a direct gift to several, or the survivors, goes to those who survive the testator." Stringer *v.* Phillips, 1 Eq. Cas. Ab. 292.

In this discussion of the doctrine laid down in Cripps *v.* Wolcott, *supra,* it is observable that neither Mr. Hawkins in his treatise on the Construction of Wills (page 260), nor his American editor, draws the distinction above noted by Mr. Theobald and hereinafter to be frequently noted, although the excerpt quoted by the latter writer from the opinion is also quoted by the former. The editor, however, notes that the authority of Cripps *v.* Wolcott was rejected in Moore *v.* Lyons, 25 Wend. 119, by the New York court; in Ross *v.* Drake, 37 Penn. St. 373, and Johnson *v.* Morton, 10 Id. 245; Branson *v.* Hill, 31 Md. 187; Martin *v.* Kirby, 11 Gratt. (Va.) 67; Drayton *v.* Drayton, Dessaus (South Car.) 324; Vickers *v.* Stone, 4 Ga. 461; Hempstead *v.* Dickson, 20 Ill. 195; and Simpson *v.* Batterman, 5 Cush. 153 (Mass.). It is also observed that the editors' citation of Vass *v.* Freeman, 3 Jones Eq. (N. C.) 224, to sustain the rule of the text founded on Cripps *v.* Wolcott is of doubtful authority, as the court there referred the period of survivorship to the death of a devisee.

O'Hara on the Interpretation of Wills, states the rule thus at p. 197:

> "If the donees take an interest vested in possession on the testator's decease, the survivorship clause is deemed to have been inserted to provide against the death of any of the donees in the testator's lifetime and to refer to the date of the testator's decease. But where there is a preceding life interest, the question is more difficult. Owing to an impression that indefinite survivorship was inconsistent with a tenancy in common, the death of the testator was the period to which the early adjudicators on the point referred the survivorship." Citing Passmore's Appeal, 23 Penn. St. 381, and Moore *v.* Lyons, 25 Wend. 119, *supra.*

In 2 Jarman on Wills (6 Am. Ed. by Bigelow 1893) at page 676 (marginal, 1548) the author states that the rule in England as laid down in Cripps *v.* Wolcott, *supra,* is not only settled but is one which the court never seeks to evade by slight distinctions. He quotes the excerpt from the opinion of Sir James Leach, the Vice Chancellor (page 672; marginal 1544) which draws the distinction herein noted between the two periods of survivorship:

> "It would be difficult to reconcile every case upon the subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them and there be no special intent to be found in the will, the survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of the *division* is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of Stringer *v.* Phillips. (I. Eq. Ca. Ab. 293, which the author says is incorrect.) *But if a previous life estate be given then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.*" (Italics the author's.)

This case was decided on the 18th day of January, 1819, in the Court of the Vice Chancellor, which is not a court of the last resort. But the doctrine was acquiesced in by the judges and is now the settled law in England. The opinion of the Vice Chancellor is contained in twenty-seven printed lines and consists of the announcement of the rule, without argument or reasoning. In the concluding sentence, the distinction of an interposing estate is drawn in the following language: "Here, there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous life estate."

The rule stated in the text of 30 A. & E. E. of L., 808, is as follows:

> "Where the gift is to take effect in possession immediately upon the testator's decease, words of survivorship are regarded as intended to provide against the death of the objects of the gift in the lifetime of a testator, and *prima facie* refer to his death." The text proceeds to add that: "The later English cases have abandoned this position entirely and have adopted the rule that whether the gift be immediate or postponed and whether the property be real or

personal, words of survivorship *prima facie* refer to the period of division. If there is no previous interest given, the period of division is the death of the testator and survivors at his death take the whole; but if a previous life estate be given then the period of division is the death of the life tenant, and survivors at such death take the whole. To the same effect is the weight of authority in the United States."

THE ADJUDICATED CASES.

Several of the authorities upon which the announced rule is founded will be noted, and these will be followed by others which construe clauses similar to that in the principal case. Attention, parenthetically, may be called to the contradictory statement of the rule in the first and second sentences of the second quotation from the text. In the case of Ridgeway *et al. v.* Underwood *et al.*, 67 Ill. 419, decided in January, 1873, the testator gave to his widow, in lieu of dower, "living and support on and from the farm and plantation on which we now reside;" and at her death and upon the youngest child attaining its majority, the estate to be converted into money and the proceeds divided among seven children or the survivors. The court held that the period of survivorship referred to the period of distribution under the language used in the will, and that this intention on the part of the testator was "fairly inferable from the language of this will, independently of all canons of interpretation." But before expressing that conclusion (which was the opposite of that reached by the circuit court) the appellate court said the question of the testator's intention as to the time of survivorship was "one of extreme doubt and very good reasons may be given for adopting either conclusion." It quotes and follows the rule in 2 Jarman on Wills, 3d Am. Ed. 462 as follows:

"In this state of the recent authorities, one scarcely need hesitate to affirm that the rule which reads a gift to survivors, simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which such survivorship can be referred; and that where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution and those only."

It is to be observed that this case differs from the principal case in the matter of the preceding estate.

Another Illinois case, Blatchford *et al. v.* Newberry, 99 Ill. 11, decided first in 1878 and on a rehearing affirmed in 1880, is pregnant with the technical learning and fine distinctions of the doctrine of survivorship. The testator there gave a life estate to his widow with remainder over to be divided equally between his two daughters, the surviver to take the whole; and in the event of the death of both daughters without lawful issue, the estate to be divided into two equal shares and disposed of as directed. The widow survived the daughters, who never married, and the question asked the court was the period of time to which the survivorship referred. The appellate court, three of the seven justices (including the Chief Justice) dissenting, followed the rule announced in the preceding case and reversed the decree of the *nisi prius* court. This estate was estimated to be worth three or four millions of dollars and was carefully considered. It is to be distinguished from the principal case in the matter of the interposing preceding estate, although this preceding estate was renounced by the beneficiary.

And this distinction in the cases which interpose preceding estates is observed and followed by Justice Sheldon of the same court, who delivered the opinion in both cases, in the case of Nicoll *v.* Scott *et al.*, 99 Ills. 529. He says at page 538:

> "It makes a difference in construing survivorship as referring to the time of distribution or not, whether all that there is of the gift is in the *direction to pay or distribute,* or whether there is an antecedent gift to devisees named, the enjoyment of which may be considered as postponed, survivorship being more readily referred to the period of division in the former case than in the latter."

In the Kentucky case of Hughes *v.* Hugnes, 12 B. Monroe 115, decided in July 1851, the testator devised his residuary estate to his children; and to his three grandchildren A. B. and C., or the survivors, he devised certain property in slaves which the grandchildren were to take "when they become of age or marry."

The court held that the devisees took an immediate interest upon the death of the testator, defeasible upon his or her death before marriage or arrival at the age of twenty-one, and the right of possession also. This case appears not to sustain the doctrine of the text in 30 Am. & Eng. Ency. of Law 808, where it is cited, as to the weight of American authority.

In the Massachusetts case of Olney *v.* Hull, 21 Pick. 311, decided October, 1838, there was a preceding life estate to the widow, remainder to be equally divided among his surviving sons. The clause was, "Should my wife marry or die, the land *then* to be divided among my surviving sons." It was held that the period of survivorship referred to the time of the distribution by the marriage or death of the widow. The opinion states "the time when the estate was to be divided among the sons is certain and definite."

In the Massachusetts case of Denny *v.* Kethell, 135 Mass. 138 (decided in 1883), there was a preceding life estate to testator's widow; and then, after certain devises, "all the residue of said trust fund, in equal portions to my surviving nephews and nieces."

The court said "the question to what period survivorship is to relate must depend rather upon the *apparent* intention of the testator, in each case, that upon any rigid rule," and held that here the testator having provided for two preceding estates, had in mind in devising the residuum of the estate a later period of survivorship than his own death.

This case is distinguishable in these particulars from the principal case.

In the recent Massachusetts case of Lawrence *v.* Phillips, *et al.*, 71 N. E. 541, decided in June, 1904, the court held that from "the natural construction of the words used," the period of survivorship referred to the happening of the contingency named in the will, to wit; upon the children arriving at the full age of twenty-one years, and not to the death of the testator.

The decision clearly rests upon the expressed intention of the devisor in the will.

In the New Jersey case of Van Tilburgh *v.* Hollingshead, 14 N. J. Eq. 35 (decided October term, 1861) there was a preceding life estate with remainder over to surviving children. It was held that "where an interest is given to one for life and after his death to his surviving children, those only can take who are alive at the time the distribution takes place." Here, also, is preceding estate.

In the New Jersey case of Williamson and wife *v.* Chamber-

lain *et als.*, 10 N. J. Eq. 373, the same rule upon a similar state of facts was followed.

In the New Jersey case of Slack and Page, Trustee *v.* Bird *et als.*, 23 N. J. Eq. 238, the same rule was followed upon a similar state of facts. The Chancellor cites with approval the case of Van Tilburgh *v.* Hollingshead, *supra,* and comments on the change of the rule of construction in the English courts. It is apparent from the remarks of the Chancellor that all of the English precedents cited, as well as the American, were cases in which was interposed a life tenancy or other terminable estate.

In the North Carolina case of Biddle *v.* Hoyt, 1 Jones Equity 159 (decided June, 1854), there was a preceding life estate with remainder over to named beneficiaries or the survivors. The court referred the time of survivorship to the death of the life tenant. The opinion quotes at length from the case of Cripps *v.* Wolcott, *supra,* on which it rests. The opinion also quotes the excerpt from 2 Jarman on Wills, 3d Am. Edition, *supra,* announcing the prevailing rule of the English courts.

In the North Carolina case of Vass *v.* Freeman, 3 Jones Equity 221 (decided in June, 1857) cited to sustain the doctrine of the text in 30 Am. & Eng. Ency. of Law 808, *supra,* the very contrary rule is held. The language of the will is similar to the clause under consideration. It follows: "I give and bequeath to my mother and Amanda G. Freeman (his sister) the whole of my estate jointly, and upon the demise of either, the survivor to have the whole in fee simple forever."

Judge Battle delivered the opinion of the court. It departs from the general rule followed by the same court in Biddle *v.* Hoyt, *supra,* and attempts to differentiate the case from the precedents, stating "that special circumstances will prevent the application of the general rule." This attempt is not clearly successful. Under the clause quoted, it was held that the mother and sister took a life estate jointly and that the period of survivorship referred not to the death of the testator but to the death of one of the life tenants. There is no preceding estate created *in totidem verbis,* but the court looking to the whole instrument was of opinion that there were special circumstances "attended by words indicating certainty in the death of the legatee, or one of the legatees." The case rests, therefore, upon the principle that the in-

tention of the testator to create the joint life tenancy and refer the period of survivorship to the death of one of the tenants, is apparent from the will itself. An argument is contained in the opinion for this contention, but it is not plain that the language of the clause is so clear as to take the case out of the general rule. Compare opinion in Goodwin *v.* McDonald, 153 Mass. 481, 27 N. E. 5, *infra*.

In the Ohio case of Sinton *v.* Boyd, 19 Ohio State Reports, 30, 2 A. R., 369 (decided 1869), a life estate to the widow preceded the estate devised to the survivors and the court referred the period of survivorship in accordance with the general rule—to the time of the death of the life tenant. This case is to be distinguished from the latter case of Renner *v.* Williams, 73 N. E. 220, decided by the same court in 1905, in the interposition of the preceding estate. In Sinton *v.* Boyd, *supra*, Judge Day draws the distinction between those cases which interpose a preceding estate and those which vest immediately upon the death of the testator.

In the Missouri case of Dodge *v.* Sherwood, 75 S. W. 417 (decided in June, 1903), Chief Justice Robinson in construing the will of Rev. Adiel Sherwood in an amicable suit therefor, on appeal from a decree of the Circuit Court of the County of Greene, discusses the doctrine of survivorship as applicable to the facts of that particular case, but the precise point under discussion here was not involved. No Missouri precedents are cited in the opinion.

In the Kentucky case of Wren *v.* Hynes, Ad., 59 Ky. 129 (2 Metc.), decided in 1859, the change in the earlier rule of construction on the part of the English courts is referred to but the cases are not examined. The court quotes the summarization of the author in 2 Jarman on Wills (side paging 632 to 650, 3d Am. Edition 462), as follows:

> "In this state of the recent authorities, one scarcely need hesitate to affirm that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator, is confined to such cases in which there is no other period to which survivorship can be referred; and where such gift is preceded by a life or other prior interest, it takes effect in favor of those that survive the period of distribution, and of those only."

The court adds that "the author further remarks, however, that this rule is definitely settled only as to gifts of personal estate." The more recent authorities question the soundness of the rule differentiating real and personal gifts, and it is believed that the courts now apply the same rule to both species of property. Schouler on Law of Wills, § 565, note; Slack *v.* Bird, 23 N. J. Eq. 241; Sinton *v.* Boyd, 19 Ohio St. 35; Branson *v.* Hill; 31 Md. 181, 1 Am. Rep. 40. In the Kentucky case the gift was of personalty under the following clause:

> "It is my will and desire that when my youngest child shall arrive at the age of twenty-one years, that the twelve thousand dollars set apart in bank stock shall be equally divided among all my surviving children, or their heirs."

The period of survivorship under that clause was held to refer to the time of the death of the testator.

In the Massachusetts case of Goodwin *v.* McDonald *et al.,* 153 Mass. 481, 27 N. E. 5, decided in 1891, the opinion of the court by Allen, J., is as follows:

> "The words of the will 'give, devise and bequeath one-half of all my property, both real and personal, to my beloved wife Sadie Goodwin, the remaining half to my dear son Francis Goodwin,' gave a fee to the wife and son. If there could be any doubt that the subsequent words, 'should either wife or son die, their share to go to the survivor,' intended a death before the testator, the words which follow, 'should both die, the property to go to the nearest of kin,' would remove it. The will cannot reasonably be construed to give life estates to the wife and son, with remainder for life to the survivor, and remainder in fee to the nearest of kin. Such a construction would be contrary to the plain meaning of the testator. Briggs *v.* Shaw, 9 Allen 516; Crossman *v.* Field, 119 Mass. 170; Moffat *v.* Cook, 150 Mass. 529, 23 N. E. 236."

In the case of Taylor *v.* Stephens, 74 N. E. 980, decided by the Supreme Court of Indiana in 1905, the testator died seized in fee of eighty acres of land. He devised a life estate to his wife, remainder over to four children equally and jointly, "or in case of the decease of any said children, his or her share to descend to the heirs of their body, if any, and if not to those surviving." The court said it had no difficulty in reading the conclusion

that the four children of the testator took a vested remainder upon his death. There was an intermediate life estate, it will be observed; but the rule even in such cases—which is stronger than the principal case, where no estate intervenes—is established in that jurisdiction. It proceeds upon the principle that the laws favor the vesting of remainders at the earliest possible moment "and to that end words of survivorship in a will are construed as referring to the death of the testator in all cases where the words of the instrument are not such as clearly to show that they refer to a subsequent date." And on the latter point the court said that while the intention of the testator is to prevail where it does not conflict with the law, it must be presumed, in the absence of language in the will repelling the influence, that the testator acted in the light of the settled meaning which the law attached to his words.

In the case of Renner *et al. v.* Williams, 73 N. E. 220, which was decided by the Supreme Court of Ohio in January, 1905, the testator devised "all the balance of my real and personal estate to my son S., and my daughters, H. and M., to be divided equally between them, share and share alike;" it being provided in a subsequent clause that the survivor or survivors should inherit the whole estate.

The court held that the time of the survivorship referred to the period of the testator's death. Judge Davis said:

> "Unless it fairly appears from the will that he does not do so, the testator must be presumed to be contemplating and providing for the devolution of his property at the time of his death. * * * It seems conclusively to follow that when a testator provides merely that in case of the death of one or more of the devisees or legatees, the survivor or survivors shall take the provision made in the will, he refers to a survivorship which shall exist at the time a devise of real estate may vest or when a legacy may be payable."

The facts in this case are identical with those in the principal case.

In the more recent Kentucky case of Carpenter *et al. v.* Hazelbrigg, 45 S. W. 666, decided in May, 1898, that court follows the rule laid down in the earlier Kentucky case of Wren *v.* Hynes, Ad. (2 Metc.) 129, *supra,* and cites it with approval. The opinion says at page 667:

> "Where a devise is made to several persons by name, with words of survivorship annexed, if the gift is to take effect in possession immediately after the death of the testator the uniform rule of construction is to refer the words of survivorship to that event, and to regard them as intended to provide against the contingency of the death of the object of the testator's bounty in his lifetime." Citing Wren *v.* Hynes, Ad., *supra,* and Wills *v.* Wills, 85 Ky. 486, 3 S. W. 900.

Here the survivors at the time of the death of the testator took a fee in the estate as of that time.

In a California case, decided in September, 1896, and reported under the style of In re Winters Estate, 45 Pac. 1063, that court does not differentiate between cases in which a preceding estate has vested and those which vest immediately upon the testator's death. There, the devise was to the widow of the testator "for the remainder of her life. Then it is to be sold and the proceeds to be divided between my surviving brothers and sisters." Under the particular wording of the clause, the court follows the English precedents to be found in Brograve *v.* Winder, 2 Vesey Jr. 638; Russell *v.* Long, 4 Vesey, 551; Elvin *v.* Elvin, 8 Vesey 547; Cripps *v.* Wolcott, 4 Madd. 15; Daniel *v.* Daniel, 6 Vesey 300; Jenour *v.* Jenour, 10 Vesey 566; Brown *v.* Lord Kenyon, 3 Madd 416. The opinion concludes that it is reasonably clear the intention of the testator was to bequeath the money proceeds of the ranch only to those of his brothers surviving at the death of the life tenant. Newton *v.* Ayscough, 19 Vesey 536, is cited as authority that "the question to what period survivorship is to relate must depend rather upon the apparent intention of the testator in each case, than upon any rigid rule, or any technical words. And this intention is to be collected from the particular disposition or the general context of the will."

It is to be observed that the intention of the testator must be indicated in the will itself and must be apparent. It is also to be observed that a preceding life estate was in the widow.

In the Maryland case of Branson *v.* Hill, 31 Md. 181, 1 Am. Rep. 40, decided in 1869, the court points out the distinction between gifts taking effect immediately upon the death of the testator and those which vest a precedent life or other terminable estate with remainder over to survivors. The opinion says:

> "Where the gift is to take effect in possession immediately upon the death of the testator, it is plain the words of survivorship must refer to that time, there being no other period in the devise to which they could relate. But where the gift is not immediate (i. e. *in possession*) there being a prior life, or other particular interest carried out, so that there is another period to which the words could refer, the question becomes one of greater difficulty."

There being a life interest interposed there, the court then proceeds to give reasons for referring the period of survivorship to the death of the testator in that case, resting the decision upon the apparent intention of the testator as indicated in the will and upon the policy of the law in favor of the early vesting of legacies and in opposition to joint tenancies with its distinctive features of *jus accrescendi,* or right of survivorship.

In the case of Kelly *v.* Kelly, 61 N. Y. 47, decided by the Commissioner of Appeals in September, 1874, the judgment of the Supreme Court was affirmed on appeal from a judgment construing the following clause in testator's will:

> "I give, devise and bequeath unto my beloved children Mary Ann Kelly and James Kelly all the real and personal estate of which I may die possessed, share and share alike. Fourth. In case of the death of either of my said children, I devise my whole estate to the survivor."

The appellate court was of the unanimous opinion "that the proper construction of the will is that the deaths referred to were those happening anterior to that of the testator" and it "found no difficulty in directing an affirmance of the judgment of the Supreme Court."

In the Virginia case of Armistead *v.* Hartt, 97 Va. 316 (decided, 1899), the following clause was construed:

> "I give and bequeath all my real estate to my four children, share and share alike, and in the event of the death of one or more of my children, his, her, or their share of my real estate shall go to those of my children living."

Here no preceding estate is interposed and the court referred the period of survivorship to the death of the testatrix in the following language which seems applicable to the clause of the principal case:

> " 'In the event of the death of one or more' of the devisees,

> his, her, or their share is given to those surviving. The words 'in the event of' impart a contingency, and must refer to death before some period or event contemplated by the testatrix, but not expressed; for, otherwise, they would be useless and meaningless, as there is no contingency about death, nothing being more certain to happen. There is no express designation in the will, nor is there anything in the language to indicate the period or event to which these words refer, and since they must be given some effect, they must be construed as having reference to that period or event which, under the circumstances, is most natural. This clearly is the death of the testatrix."

In this jurisdiction the law is settled that even in those cases which interpose an intermediate estate, the period of survivorship refers to the death of the testator. Allison *v.* Allison, 101 Va. 565.

OPINION.

The text writers and courts everywhere recognize the difficulty of formulating rules for the construction of wills. Mr. Justice Story in Sisson *v.* Seabury, 1 Sumner 235, says:

> "Lord Eldon has observed that the mind is overpowered by their multitude and the subtlety of distinctions between them. To lay down any positive rules of universal application in the interpretation of wills must continue to be, as it has been, a task if not utterly hopeless at least of extraordinary difficulty." "I repudiate entirely," said Lord Chancellor Halsbury, "the notion of laying down any canon of construction which is to extend beyond the particular instrument that I am called to give an interpretation to." Seale-Hayne *v.* Jodrell, 44 Ch. Div. 590.

There is one rule, however, of universal application which the authorities have evolved. It is that the plain intent of the testator, as evinced by the language of his will, must prevail. And this intent is to be gathered from the whole instrument and not from detached portions alone. But it is the intent of the testator as expressed in his own will which governs; and this intention must be discerned through the words of the will itself, as applied to the subject matter and the surrounding circumstances. In other words, the plain and unambiguous words of the will must prevail and cannot be controlled by or qualified by any conjecture or doubtful construction growing out of the situation, circum-

stances, or condition of the testator, his property or the natural objects of his bounty. And since the interpretation and exposition of certain phrases found in similar wills are entitled to weight it may sometimes happen that the intention as expounded by the courts differs from the testator's own private intention and understanding. For the true inquiry is not what the testator meant to express but what the words used in the will do express. Schoulder on Wills § 466, 468. Another rule of construction which may be regarded as settled is that where a testator employs technical words and phrases to express his intention, the presumption of law is that he used them in the sense of their settled legal meaning, unless the contrary is made to appear. From this it follows as a necessary corollary, that if the technical language employed brings the testator's case within some precise rule of law, that rule must take effect. Id., § 470.

In the clause of the will under consideration, the technical word "survivor" is used and the sole question presented by it is the period of time to which the courts have referred the use of the word in similar clauses and under similar facts. In other words, the testator has used technical language which brings the case within a precise rule of law, and the inquiry is to ascertain the limitation of that rule.

It will appear from the authorities above cited that the period of time held by the courts almost without exception where no intermediate estate is interposed, is the death of the testator. In the North Carolina case of Vass *v.* Freeman, 3 Jones Eq. 221, with a state of facts similar to those under consideration, a departure was made from the general rule; but even there an argument was made in the opinion to make it appear as being consistent with the prevailing doctrine. This is an exceptional case. The rule of referring the period *prima facie* to the time of the testator's death is very old, and has not been departed from, so far as the writer is advised, except in the case noted. The English cases and those in the United States available for examination, in which the period of survivorship has been referred to a death other than that of the testator, are all distinguishable from the present case in that they interpose a terminable estate between the death of the testator and the vesting of the remainder in survivors. This distinction is expressly recognized by the Illinois,

Ohio and Maryland courts in the above cases in specific language and it is made a feature of the case of Cripps *v.* Wolcott which makes the departure from the old rule by the English courts, and of the rule announced in 30 Am. & Eng. Ency. of Law, 808; in Jarman on Wills, in Schoulder on Wills, and other text writers.

Upon the foregoing authorities, the gift, in the clause of the will under discussion, being immediate, the period of survivorship refers to the death of the testator, and the two beneficiaries take undivided moieties in fee upon the happening of that event. In the particular case, it is known that the testator and the draughtsman both believe that, upon the death of the testator, the clause devised a life estate to each of the devisees with remainder over to the survivor of them, and the testator died under this belief. The clause presents a striking illustration of the probity of Vice Chancellor Wood's warning, that "this word 'survivor' is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing."

J. T. LAWLESS.

Norfolk, Va., March 19, 1908.

REMOVAL OF JUDGES BY THE LEGISLATURE.

It is proposed in this article briefly to consider and construe § 104 of the Virginia Constitution of 1902, which is as follows:

> "Judges may be removed from office for cause, by a concurrent vote of both houses of the General Assembly; but a majority of all the members elected to each house must concur in such vote, and the cause of removal shall be entered on the journal of each house. The judge against whom the General Assembly may be about to proceed shall have notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon."

Without undertaking to review the history of its adoption, or to cite any of the cases in which it has been proceeded under, it is the purpose of this article to contend that the section as it stands, clearly contemplates a purely legislative proceeding,